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No. 09-461

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

STEPHEN MICHAEL WEST,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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PETITION FOR REHEARING

Petitioner Stephen Michael West respectfully moves this Court to reconsider its March 1, 2010 Order denying West's petition for writ of certiorari.

West's petition called on this Court to clarify how federal habeas courts should properly weigh mitigating evidence in analyzing whether a petitioner has shown prejudice under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In West's case, a divided panel of the Sixth Circuit denied relief because it found that West had failed to show prejudice. In the panel's analysis, the evidence that West had suffered severe childhood abuse might have been aggravating rather than mitigating, because the jury might have believed that "violence begets violence" and therefore "despised" West with "greater zeal." Pet. App. 26a (*West v. Bell*, 550 F.3d 542 (6th Cir. 2008)). The court of appeals therefore discounted petitioner's evidence as potentially "double-edged," and found no prejudice from counsel's failure to discover and present it.

In his petition, West demonstrated that there is a growing split among the lower courts on the treatment of this type of mitigating evidence. As the petition discusses more fully, the Fourth, Fifth, and Sixth Circuits and the Supreme Court of Florida have ruled that mitigating evidence may be discounted if it could potentially have an aggravating edge. But the Third, Eighth, Ninth, and Tenth Circuits and the Supreme Court of Georgia have ruled that such evidence may not be so discounted.

This Court should reconsider its denial of certiorari in West's case because this issue continues to appear in court of appeals decisions. Further entrenching the split described above, the Ninth Circuit has recently reaffirmed its approach to mitigating evidence in two capital habeas cases, both of which were decided after West's petition and reply brief were submitted to this Court.

In *Rhoades v. Henry*, __ F.3d __, No. 07-99022, 2010 WL 761146 (9th Cir. Mar. 8, 2010), the Ninth Circuit ruled that evidence of childhood abuse suffered by the petitioner was properly considered mitigating. The Ninth Circuit ultimately denied relief because the record showed that the original sentencing court was already aware of the most relevant mitigating evidence. *Id.* at *22. In reaching this holding, however, the Ninth Circuit emphasized this Court's decisions indicating that evidence of severe childhood abuse, like that suffered by West, is indeed mitigating:

> In *Rompilla* [*v. Beard*, 545 U.S. 374 (2005)], the additional mitigating evidence showed that the petitioner was beaten by his father with his hands, fists, leather straps, belts, and sticks, [and] was subjected to yelling and verbal abuse . . . .
>
> In *Wiggins* [*v. Smith*, 539 U.S. 510 (2003)], the petitioner experienced severe privation and abuse in his first six years of life, and physical torment, sexual molestation, and repeated rape thereafter in foster care. . . .

> In *Williams* [*v. Taylor*, 529 U.S. 362 (2000)], new evidence showed the petitioner had been severely and repeatedly beaten by his father . . . .

Rhoades, 2010 WL 761146, at *19.

The same type of evidence that the Ninth Circuit held to be mitigating in *Rhoades* was presented during West's post-conviction hearing. West was beaten by his parents with his mother "[s]winging a belt so long and so hard that it would wear her out." Pet. App. 98a; 6th Cir. JA at 1955. The beatings left him with "[b]ruises, black eyes, busted lips, pulled hair, pinch marks." *Id.* He was also hit so hard that he became cross-eyed. Pet. App. 87a. Yet the Sixth Circuit inexplicably believed that this evidence could have been aggravating rather than mitigating.

In *Robinson v. Schriro*, 595 F.2d 1086 (9th Cir. 2010), the Ninth Circuit reversed the district court's denial of habeas relief because the district court's misunderstanding of the role of mitigating evidence caused it to "improperly reject or under-weigh valid mitigating evidence." *Id.* at 1112. In that case, the evidence that was "under-weigh[ed]" was very similar to the evidence that the Sixth Circuit found to be potentially aggravating in West's case: it was evidence of an impoverished, unstable, and abusive background. *Id.* The Ninth Circuit's ruling stands in stark contrast with the rule applied in West's case, and calls for this Court's intervention to ensure the fair and uniform administration of justice and the correct application of its jurisprudence in capital cases.

Indeed, the Sixth Circuit's approach in this case is so inherently erroneous that Petitioner respectfully requests that this Court reconsider its earlier decision on West's petition, grant his petition, and summarily reverse. The Sixth Circuit's holding that West's evidence of severe childhood abuse could actually incite the jury to "despise West and sentence him to death with greater zeal" flies in the face of this Court's jurisprudence on what constitutes mitigating evidence in a capital case. In the two recent cases cited in this Petition for Rehearing, the Ninth Circuit gave proper effect to this Court's decisions in *Rompilla*, *Wiggins*, and *Williams*. The fact that West's evidence was treated so differently from the similar evidence at issue in *Rhoades*, and that his case turned out so differently from *Robinson*, demonstrates the unfairness of the Sixth Circuit's decision and the need for this Court's intervention.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit fails to adhere to the precedent of this Court and conflicts with the decisions of other federal circuits. Rehearing should therefore be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for petitioner Stephen Michael West, I hereby certify that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Supreme Court Rule 44.2.